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In the Supreme Court

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United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents and co-guardians,
LESTER L. and JOYCE CRUZAN,
Petitioners,

VS.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND
ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER
at MOUNT VERNON,
Respondents,

VS.

THAD C. MCCANSE, Guardian ad Litem,
Respondent.

**On Writ of Certiorari to
the Supreme Court of Missouri**

AMICUS CURIAE BRIEF ON BEHALF OF THE AIDS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The AIDS Civil Rights Project is a subdivision of National Gay Rights Advo-

cates, a non-profit, public interest law firm. The Project engages in litigation and community education throughout the United States on behalf of persons with Acquired Immune Deficiency Syndrome ("AIDS"). As advocates for persons with AIDS, amicus' interest in this case is to ensure that persons with AIDS are not kept alive through extraordinary means against their wishes.

SUMMARY OF ARGUMENT

The right of liberty protected by the Constitution includes the right to make decisions pertaining to one's bodily integrity. An individual's right to refuse treatment that artificially delays death is a right that warrants constitutional protection. Because there is no legal distinction between artificial nutrition and hydration and other death-

delaying treatments, artificial nutrition and hydration are treatments that individuals have a right to refuse.

Incompetent individuals, including those with irreversible loss of brain function, retain the constitutional right to refuse treatment. That right becomes meaningless unless someone is permitted to exercise it on behalf of the incompetent individual. An individual's loved ones or guardians are in the best position to act as decisionmakers, taking into account the individual's best interests and expressed desires.

ARGUMENT

I. An Individual Has a Federal Constitutional Right To Refuse Treatment That Artificially Delays Death.

This Court has a long tradition of recognizing a fundamental right of liberty

protected by the Due Process Clause of the Constitution. This right of liberty encompasses "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (J. Brandeis, J., dissenting). As this Court has stated,

> "Without doubt, [the liberty protected by the Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those

> privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Thus, this Court has found in "matters relating to marriage, procreation, contraception, family relationships and childrearing and education" that "there are limitations in the States' power to substantively regulate conduct." Paul v. Davis, 424 U.S. 693, 713 (1976). A common thread that runs through these decisions is that constitutional protection extends to decisions affecting deeply personal matters that are most often made by the individual or within the family or extended family structure. As stated in Prince v. Massachusetts, 321 U.S. 158, 166 (1944), these decisions "have respected

the private realm of family life which the state cannot enter."

Although this Court has not expressly ruled on an individual's constitutional right to refuse medical treatment, decisions affecting one's medical care are just such deeply personal and individual decisions that warrant constitutional protection. Indeed, the constitutionally protected rights necessarily include "the freedom to care for one's health and person," which right "has no more conspicuous place than in the physician-patient relationship." Doe v. Bolton, 410 U.S. 179, 213, 219 (1973) (Douglas, J., concurring).

Numerous other courts have recognized that this Court's decisions "have enunciated a principle of self-determination that encompasses the right of an individual to control his or her own body, subject to certain governmental interests."

Gray by Gray v. Romeo, 697 F.Supp. 580, 584 (D.R.I. 1988); accord: Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417, 497 N.E.2d 626 (1986); Foody v. Manchester Memorial Hospital, 40 Conn.Sup. 127, 482 A.2d 713 (1984); Matter of Welfare of Colyer, 99 Wash.2d 114, 660 P.2d 738 (1983). As the Fourth Circuit has declared:

> "The right to be free of unwanted physical invasions has been recognized as an integral part of the individual's constitutional freedoms, whether termed a liberty interest protected by the Due Process Clause, or an aspect of the right to privacy contained in the notions of personal freedom which underwrote the Bill of Rights. The right to refuse medical treat-

ment has been specifically recognized as a subject of constitutional protection." United States v. Charters, 829 F.2d 479, 491 (4th Cir. 1987).

Recently, this Court declined to recognize a right to privacy on the facts before it, but it recognized that federally protected liberty and privacy interests include those that are "deeply rooted in this Nation's history and tradition." Bowers v. Hardwick, 478 U.S. 186, 192 (1986). The right to control medical decisions affecting one's body is just such a right. For example, almost one hundred years ago, this Court held that an individual could not be ordered to submit to a surgical examination, stating,

> "No right is held more sacred, or is more carefully guarded, by the common law, than

> the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific Railroad Co. v. Botsford, 141 U.S. 250, 251 (1891).

Numerous other decisions reflect this Court's strong interest in protecting an individual's right to make decisions affecting one's own body. See Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Roe v. Wade, 410 U.S. 113 (1973) (abortion). More recently, this Court held that a criminal defendant could not be compelled to submit to surgery to remove a bullet, finding that "the intrusion on respondent's priv-

acy interests entailed by the operation can only be characterized as severe." Winston v. Lee, 470 U.S. 753, 766 (1985).

An individual's interest in avoiding treatment that artificially delays death is as important as other constitutionally protected rights pertaining to an individual's bodily integrity. This Court should expressly recognize that such interest is also subject to constitutional protection.

II. Artificial Nutrition and Hydration Are Treatments That Individuals Have a Right To Refuse.

The Missouri Supreme Court expressed doubt that artificially maintained hydration and nutrition constitutes "medical treatment." Appx. to Pet. for Writ of

Certiorari ("Appx."), pp. A35-A36.[1] However, the denomination of such treatment as "medical" or otherwise is beside the point. Unquestionably, life is artificially maintained when hydration and nutrition are furnished through a gastrostomy tube inserted directly into the stomach of an individual otherwise unable to receive food and water. As one court has put it:

> "Although an emotional symbolism attaches itself to artificial feeding, there is no legal difference between a mechanical device that allows a person to breathe artificially and a mechanical device that artificially allows a person nourishment. If

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1 "[C]ommon sense tells us that food and water do not treat an illness, they maintain a life." Appx., p. A36.

> a person has the right to decline life on a respirator [citation omitted], then a person has the equal right to decline a gastrostomy tube." Gray by Gray v. Romeo, supra, 697 F.Supp. 580, 587.

Ultimately, the Missouri Supreme Court sidestepped this issue, declaring that the issue to be determined was whether "artificial hydration and nutrition is oppressively burdensome to Nancy in this case." Appx., p. A37 (emphasis by court). In "balancing" the state's interest against Nancy Cruzan's right to refuse medical treatment, the court concluded that the state's interests prevailed on the reasoning that artificial nutrition and hydration are not physically burdensome when the individual feels no pain. This theory proves too much. An individ-

ual in a permanent vegetative state has no awareness of pleasure or pain, and therefore no medical treatment would be physically burdensome to such a person. Using the Missouri court's logic, the state's interest in life would always override the right of a patient in a permanent vegetative state to forego death-prolonging treatment. Such a one-sided "balancing" test is constitutionally impermissible. "The problem is not to preserve life under all circumstances but to make the right decisions. A conclusive presumption in favor of continuing treatment impermissibly burdens a person's right to make the other choice." Conservatorship of Drabick, 200 Cal.App.3d 185, 209, 245 Cal.Rptr. 840 (1988).

Thus, the issue is not whether Nancy Cruzan is "burdened" by the treatment provided. Rather, the issue is whether an

individual has a right to reject unwanted treatment that artificially postpones death. The vast majority of decisions that have addressed the issue of withholding or withdrawing artificial nutrition and hydration have failed to make a legal distinction between this treatment and any other type of life sustaining treatments, such as respirator therapy. These decisions recognize that an individual possesses a right to have artificial feeding withdrawn. See Gray by Gray v. Romeo, supra, 697 F.Supp. 580; Bouvia v. Super.Ct. of Los Angeles, 179 Cal.App.3d 1127, 225 Cal.Rptr. 297 (1986); Corbett v. D'Alessandro, 487 So.2d 368 (Fla.Dist.Ct.App. 1986); In re Gardner, 534 A.2d 947 (Me. 1987); Brophy v. New England Sinai Hospital, Inc., supra, 398 Mass. 417, 497 N.E.2d 626.

In connection with its assertion that the gastrostomy tube was not a "burden" to Nancy Cruzan, the Missouri court distinguished between the placement of the tube, which it recognized to be invasive, and the continuation of feeding through the tube, which it declared to be non-invasive. Appx., pp. A34. Such a distinction is arbitrary on its face. It is tantamount to holding that an individual (or an individual's loved ones or guardian) may initially decline insertion of a gastrostomy tube but cannot seek to have it removed once it is inserted. As one court noted, "Such a rule could discourage families and doctors from even attempting certain types of care and could thereby force them into hasty and premature decisions to allow a patient to die." Gray by Gray v. Romeo, supra, 697 F.Supp. 580, 588-589, n. 4.

III. An Individual's Right To Refuse Medical Treatment Can Be Exercised on Her Behalf.

The Missouri court expressly recognized that:

> "[T]he evidence is clear and convincing that Nancy will never interact meaningfully with her environment again. She will remain in a persistent vegetative state until her death." Appx., p. A34.

Nonetheless, the court held that the state had "a vital interest," surpassing the interest and wishes of Nancy Cruzan and her loved ones, in maintaining Nancy Cruzan's artificially supported life. Appx., pp. A38. The Missouri court based its holding on the reasoning that the state's interest in life is unqualified and does

not diminish when the quality of life diminishes. The necessary corollary of this reasoning is that an individual's right to refuse medical treatment diminishes when the quality of his or her life diminishes. By refusing to allow Nancy Cruzan's guardians to make decisions regarding her treatment and care, the court has singled out individuals whose injuries or illnesses have left them incompetent, and it has determined that no one can exercise their rights on their behalf.

The Missouri court appears to have been influenced by its strongly expressed doubt that an incompetent individual possesses <u>any</u> rights. See Appx., p. A40. However,

> "Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain 'rights' to

be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interest of the principal in mind." Thompson v. Oklahoma, _____ U.S. ____, 108 S.Ct. 2687, 2693, n. 23 (1988) (plurality opinion).

Accordingly, numerous courts have recognized that an incompetent possesses the fundamental right to accept, or reject, treatment that will artificially postpone death. See Gray by Gray v. Romeo, supra, 697 F.Supp. 580; Brophy v. New England Sinai Hospital, Inc., supra, 398 Mass. 417, 497 N.E.2d 626; Conservatorship of Drabick, supra, 200 Cal.App.3d 185, 245 Cal.Rptr. 840; In re L.H.R., 253 Ga. 439, 321 S.E.2d 716 (1984); Matter of Welfare of Colyer, supra, 99 Wash.2d 114, 660 P.2d 738. And, as one court observed,

> "Once it is acknowledged that [the incompetent] has a right to have medical treatment decisions made in his best interests, it is readily apparent that the right is meaningless unless someone is permitted to make the decision." Conservatorship of Drabick, supra, 200 Cal.App.3d 185, 209, 245 Cal.Rptr. 840.

The Missouri court, however, observed that guardianship is a creature of state law, carrying with it no right to make decisions affecting Nancy Cruzan's treatment. Appx., pp. A41.[2] In so reasoning,

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2 The Missouri court also expressed concern that surrogate decisionmakers may act arbitrarily and that the state needs to protect incompetents from abuse. Appx., p. A41. In rare cases, this possibility exists, and the state is not powerless to protect incompetents in such (continued...)

the court ignored the constitutional basis for Nancy Cruzan's right of choice:

> "Both the fundamental right to life--and to continue receiving treatment--and the right to terminate unwanted treatment deserve consideration. Someone acting in [the incompetent's] best interests can and must choose between them." Conservatorship of Drabick, supra, 200 Cal.App.3d 185, 210, 245 Cal.Rptr. 840 (emphasis added).

Indeed, "to deny the exercise because the patient is unconscious would be to deny

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2(...continued)
cases. See In Re Gardner, supra, 534 A.2d 947. However, this possibility does not provide an excuse to deny incompetents their rights entirely.

the right." Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334, 1347 (Del. 1980).

In balancing the state's interest in life with Nancy Cruzan's right to forego medical treatment, the Missouri court ignored the acknowledged fact that her condition is incurable and emphasized its view that she is not "terminally ill." Appx., p. A38. However, advancing medical technology has in many cases rendered meaningless the distinction between a terminally ill patient and a nonterminally ill patient. As one court noted,

> "Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by med-

> ical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity." Rasmussen by Mitchell v. Fleming, 741 P.2d 674, 678 (Ariz. 1987).

As decisionmaker, the state did not take into account Nancy Cruzan's best interests or desires, but only its determination to prolong life at all costs. Rather than allowing Nancy Cruzan's loved ones to exercise her right of choice, the state has substituted its own judgment that, despite the incurable nature of her condition, Nancy Cruzan must continue her persistent vegetative state attached to artificial feeding tubes. Yet, Nancy Cruzan's guardians, who have knowledge of Nancy Cruzan's statements and her philosophy of life, are unquestionably far better

equipped to make such a deeply personal decision on her behalf. Their authority to exercise these rights arises from Nancy's constitutional right and need not be conferred by the state.[3]

Thus, the real issue in this case is whether the state, having made the arbitrary decision that noncognitive, hopeless "life" must continue, may entirely usurp the position of decision-maker for Nancy Cruzan:

> "To put it more precisely, the state has an interest in protecting [the incompetent's] right to have appropriate medical treatment decisions made on his

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3 The Missouri court relied on the rule that a third party cannot veto the exercise of another party's right. See Appx., pp. A40-A41. That principle is irrelevant when, as here, third parties seek to vindicate another's right against intrusive state action.

behalf. The problem is not to preserve life under all circumstances but to make the right decisions. A conclusive presumption in favor of continuing treatment impermissibly burdens a person's right to make the other choice." Conservatorship of Drabick, supra, 200 Cal.App.3d 185, 209, 245 Cal.Rptr. 840.

A decision by those intimately involved with Nancy Cruzan who take into account her dignity, best interests and desires is better than a purely technological decision to do whatever is possible. The consequence of the Missouri court's decision is that Nancy Cruzan, and others like her, must remain passive subjects of a medical technology that offers no hope for cognitive human life. How-

ever, "the decision whether to end the dying process is a personal decision for family members or those who bear a legal responsibility for the patient." In re L.H.R., supra, 253 Ga. 439, 321 S.E.2d 716, 723 (Ga. 1984).[4] The Constitution requires that Nancy Cruzan's parents and co-guardians be entitled to exercise her

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4 The Missouri court declared that, "absent the most rigid of formalities" (i.e., a living will), an incompetent's right to privacy could be exercised by a third party only upon clear and convincing evidence of the incompetent's intent (Appx., pp. A40-A41). Apart from being an unconstitutionally restrictive limitation on an incompetent's right of choice (see discussion, supra, p. 12), such a rule misses the point. "[S]tatements [of an incompetent's intent] do not in themselves amount to the exercise of a right." Conservatorship of Drabick, supra, 200 Cal.App.3d 185, 211, 245 Cal. Rptr. 840. Rather, evidence of the incompetent's desires (shown by statements to family, loved ones or friends), as well as the incompetent's entire prior lifestyle, is useful in guiding a guardian or other person acting in the incompetent's behalf.

right to refuse treatment that artificially prolongs a hopeless existence.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Missouri Superior Court should be reversed.

Respectfully submitted,

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